# Supreme Court of the United States,

OCTOBER TERM, 1888.

**No. 1076.**

STUTSMAN COUNTY, Appellant.

vs.

CHARLES S. WALLACE AND JAMES M. MARTIN, AS ASSIGNEE OF DANIEL H. WALLACE

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

Motion by Defendants to dismiss the Appeal with motion to affirm.

J. H. BALDWIN,
Attorney for Defendants.

*To* .....

*Attorneys for Appellant.*

You are hereby notified that the within motion with briefs, will be presented to the Supreme Court of the United States, on Monday, ..... ....1889, at the convening of said Court.

# IN THE SUPREME COURT OF THE UNITED STATES.

OCT. TERM, 1888. No. 1076.

STUTSMAN COUNTY, APPELLANT,

vs.

CHARLES S. WALLACE AND JAMES M. MARTIN,

ASSIGNEE OF DANIEL H. WALLACE.

*Appeal from the Supreme Court of Dakota Territory.*

MOTION TO DISMISS THE APPEAL WITH MOTION TO AFFIRM.

Now, Oct. 7 & 1889, comes defendants, Chas. S. Wallace and James M. Martin, Assignee of Daniel H. Wallace, by their attorney, J. H. Baldwin, and moves the court to dismiss the appeal in the above stated case for the following reasons:

1st. That at the time of the allowance of said appeal by the Chief Justice of the Supreme Court of Dakota Territory and the issuing of the citation by him, the said case was not pending in said Supreme Court, but was then pending in the District Court of Stutsman County, said Territory, the record and all proceedings therein having long prior thereto been remitted to said District Court, and said Chief Justice had no jurisdiction or authority in the premises to allow said appeal and award said citation.

2d. That the record, as certified by the clerk of said Supreme Court, and filed by appellant, is not the record in said case.

3d. That the said record being in the District Court of Stutsman county at the time of the allowance of this appeal, was not brought up by the appeal as taken, nor by any subsequent proceeding on the part of the appellant, and therefore no record has been filed with the clerk of this court. There is, therefore, no record before the court in this case.

Defendants also move the court to affirm the judgment of the court below for the reason, that there are no errors assigned or questions involved in said appeal, which this court would, after

final argument, consider, and that it is manifest that the appeal was taken for delay only; and they further pray that if it be the opinion of the court that said appeal was sued out for the purpose of delay, that damages at the rate of ten per cent., in addition to interest, be awarded them upon the amount of the judgment, in accordance with the 23d rule of this court.

J. H. BALDWIN,
Attorney for Defendants.

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## STATEMENT OF THE CASE.

The following is a brief statement of the case presenting the questions involved in the foregoing motion to dismiss and affirm. The Northern Pacific Railroad Company, a corporation organized and existing under the Act of Congress, approved July 2d, 1864, 13 U. S. Stat. at Large, 367 to 369, and subsequent acts and resolutions of Congress relating thereto, had granted to it by said act each and every of the severally described pieces of land set forth in the Schedules A and B in the printed record of this case on pages 7 to 25 inclusive; everything had been done by it to acquire a complete and perfect title thereto, except the payment of the costs of survey and selection thereof, and fees for taking out the patents therefor, as required by the Act of Congress of July 15th, 1870, appropriating certain moneys to defray the costs of surveying and selecting the lands of said corporation. 16 U. S. Stat. at L., 305 and 306.

That up to March 16th, 1886, said corporation had not complied with any of the requirements of said act of July 15th, 1870, to complete a perfect title to said lands in itself. That in the year 1880, the officers of the county appellant, authorized to assess property therein for the purpose of taxation and to levy and assess taxes, assessed said several pieces of land contained in schedule A, and levied thereon, Territorial, County, General School and District School taxes for the year 1880; also in the year 1881 said officers assessed said lands in schedule A, and levied taxes for the same purpose. That none of said taxes assessed as aforesaid having been paid, the treasurer of said county ad-

vertised said lands for sale, for the payment of said taxes, on the first Monday of October, 1882, and sold the same to the said defendant, Charles S. Wallace, for the sums respectively mentioned in said schedule, and amounting in the aggregate to $5221.75, and who upon the same day paid to said Treasurer the amount of his said bid, together with the taxes of 1881, due and payable for the preservation of his lien therefor, and equitable title to said lands, viz: $4699.25, and received from the said Treasurer his certificate of sale of lands in form provided by law to be issued upon the sale of lands for non-payment of taxes. In the year 1882, the officers aforesaid, assessed all of the pieces of land mentioned and described in Schedule B, and levied taxes thereon for the same purpose, viz: Territorial, County, General School, and District School taxes, for the year 1882, all of which taxes remained unpaid on October 1st, 1883. That upon that day, the treasurer of said county, after duly advertising said lands for sale for non-payment of taxes, sold the same to the said defendant, Charles S. Wallace, for the aggregate price or sum of six thousand and thirty-three dollars, whereupon the said treasurer executed and delivered to said Charles S. Wallace certificates of sale of said lands, in form as provided by law.

In October, 1884, and September, 1885, two certain actions were brought in the District Court in and for said Stutsman county, Dakota Territory, wherein said Northern Pacific Railroad Company was plaintiff, in one of which William E. Mansfield, the then treasurer of said appellant county, and said defendant, Charles S. Wallace were defendants, and in the other, George L. Webster, the then county treasurer of said appellant county, and said Wallace were defendants, the object whereof was to obtain decrees that said defendants, William E. Mansfield, and George L. Webster, treasurers of said county, their deputies and successors,be forever enjoined and restrained from executing any tax deed, or deeds conveying any of the parcels of land, in the first case described in schedule A, and in the second in schedule B, based upon or growing out of the sales of said lands to said Charles S. Wallace, or to enforce the payment of the taxes assessed against the same.

That thereafter, on the 6th of August, 1886, in the first case, and Sept. 17th, 1886, in the second case, and after the decision

of your Honorable Court of the case of the Northern Pacific Railroad Co. vs. Traill Co., 115 U. S., 600, &c., said court made its final decree in said cases granting the injunctions and restraining orders as prayed for by said plaintiff railroad company. (See printed record, p. 30, 31, 32.)

That after said restraining orders were made in the above stated cases, said Charles S. Wallace, and James M. Martin, assignee of Daniel H. Wallace. who had by assignment acquired an interest in said certificates of sale, brought this suit to recover the amount paid for the said lands, at said tax sales with subsequent taxes paid thereon, in the District Court of Stutsman Co., in said Territory.

On April 13th, 1887, the facts were stipulated and filed by the parties in said court, (see printed record, page 27-33, inclusive), and on the same day, (April 13th, 1887,) appellant county moved the court for judgment. (For motion for judgment see printed record, page 33.)

On the same day after argument, and submission of case, the court found the facts and enters judgment for plaintiffs. (For findings of fact and conclusion of laws with order for judgment, see printed record, page 34.)

On the same day, to-wit, April 13th, 1887, appellant county filed, in said court its exceptions to the order of Court denying its said motion for judgment. (For exceptions to order of court, see printed record, page 36.)

On the same day appellant county also filed a motion for new trial. (For motion for new trial see printed record, page 37.)

On the same day, the court, after hearing, over-ruled the motion and denied a new trial, whereupon appellant county took their appeal to the Supreme Court of the Territory, assigning for error the rulings and orders of the District Court. (See assignments of error to District Court, printed record, page 39-40.)

At May Term, 1887, of the Supreme Court of Dakota Territory, the case was heard, and on May 26th, 1887, said court affirmed, in all things, the judgment of the District Court, and ordered the cause remanded to the District Court for further proceedings according to law. (See judgment, and order of the Supreme Court, printed record, page 39-40.)

That on June 22d, 1887, the record of said cause was remitted by the clerk, in obedience to the order of the Supreme Court, to the District Court of Stutsman county. (See extract from return of clerk of Supreme Court of Dakota Territory, in answer to certiorari on page 54 of printed record.)

On Feb. 6th, 1888, appellant county moved the Supreme Court of Dakota Territory for a rehearing in the case, which motion was at the February term of said court, heard and dismissed on the ground that said court was without jurisdiction, the case having been remitted to the court below. (See reasons of court filed, return of clerk to certiorari, page 54 of printed record.)

On Feb. 24th, 1888, appellant county presented to said Supreme Court its petition praying that an appeal may be allowed and that a transcript of the record and proceedings in the case duly authenticated may be sent to your Honorable Court, which appeal was allowed by Bartlett Tripp, Chief Jnstice of said court, who afterwards, on March 16th, 1888, signed and issued his citation in said case to defendants and appellees.

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## ARGUMENT.

First, on the motion to dismiss.

From the record of the proceedings had in this case in the Supreme Court of the Territory, two questions presents themselves, 1st. Is this cause properly in this court? and second are the records and proceedings certified to this court, the records of the case?

At the date said case was appealed to, argued, and disposed of in the Supreme Court of the Territory of Dakota, the following territorial statutes regulating the transmission of records to and from the Supreme Court were in force in said Territory, namely: Sections 4 and 25, of chapter 20, of the acts of the Territorial legislature, approved March 11th, 1887, which read as follows:

Section 4. (Transmission of * * * papers by clerk.)

"Upon an appeal being perfected the clerk of the Court from which the appeal is taken shall, at the expense of the appellant,

forthwith transmit to the Supreme Court, if the appeal is from a judgment, the judgment roll; if the appeal is from an order, he shall transmit the order appealed from, and the original papers, used by each party, on the application of the party appealed from. The Court may, however, in each case, direct copies to be sent in lieu of the originals. The clerk shall also, in all cases, transmit to the Supreme Court the notice of appeal and undertaking given thereon; and he shall annex to the papers so transmitted a certificate, under his hand and the seal of the Court, from which the appeal is taken, certifying that they are the original papers or copies, as the case may be, and that they are transmitted to the Supreme Court pursuant to such appeal. No further certificate or attestation shall be necessary."

Section 25. (Court may grant a rehearing. What clerk must transmit.)

"Upon an appeal from a judgment or order, or upon a writ of error, the Supreme Court may reverse, affirm or modify the judgment or order, and as to any or all of the parties; and may, if necessary or proper, order a new trial; and if the appeal is from a part of the judgment or order, may reverse, affirm or modify, as to the part appealed from.

In all cases the Supreme Court shall remit its judgment or decision to the Court from which the appeal or writ of error was taken, to be enforced accordingly; and if from a judgment, final judgment shall thereupon be entered in the Court below, in accordance therewith, except where otherwise ordered, the clerk of the Supreme Court shall remit to such Court the papers transmitted to the Supreme Court, the appeal or writ of error, together with the judgment or decision of the Supreme Court thereon, within sixty days after the same shall have been made, unless the Supreme Court, on application of either of the parties, shall direct them to be retained for the purpose of enabling such parties to move for a re-hearing. In case such motion for a re-hearing is denied, the papers shall be remitted within twenty days after such denial. The clerk of the Supreme Court shall, in all cases, except when the order or judgment is affirmed, also transmit with the papers so returned by him, a certified copy of the opinion of the Supreme Court, and his fees for such copy shall be taxed and allowed with his other fees in the case."

The purported record on file in this case discloses no order for copies to be certified by the clerk of the District Court. And hence, on the 26th day of May, 1887, when the Supreme Court reviewed the cause, and affirmed in all things the judgment of the District court, "and remitted the cause to that Court for further proceedings according to law;" it must have had under consideration the files constituting the original records in the case.

The provisions of section 25, above quoted, require the clerk of the Supreme Court to remit to the District Court the papers certified to the Supreme Court on the appeal, together with the judgment or decision of the Supreme Court thereon, within sixty days after the same is made, unless the Supreme Court on application of either of the parties, directs them to be retained for the purpose of enabling such parties to move for a rehearing, etc. The purported records now on file in this Court do not disclose that any such application was made by, or order granted to the appellant but it does disclose the fact that no application was made for a re-hearing in the Supreme Court for nearly nine months after the rendition of said judgment, viz: on February 6th, 1888, when the motion was denied on the ground that the Supreme Court was without jurisdiction, "*the case having been remitted to the Court below.*" (See reasons of the Court filed, page 54 of printed record.) All this transpired prior to any effort on appellants part to perfect an appeal to this Court in said cause. It follows, then, according to the record, that on February 24th, 1888, when the appellant county presented to said Supreme Court its petition for an appeal, asking that a transcript of the record and proceedings in the case, duly authenticated, be sent to this Court, there not only was not, but could not, without a direct violation of the law, have been any cause pending, or a single paper constituting the record thereof on file in said Court, and said Supreme Court was at that time stripped of jurisdiction, as well as of all records of any proceedings had in said cause, except such as might be shown by its trial docket. By what authority then, did the Hon. Chief Justice of that Court, on March 16th, 1888, allow said appeal, and sign and issue his citation to the parties to said cause, and whence comes the record now in this Court?

We are not required to consider the proposition which has

been recently discussed before this Court, as to whether or not an appeal may be taken, by the observance of the proper rules of procedure, from the judgment of the Supreme Court of a Territory, to this Court, after the remittiture had been sent down, but within the time allowed for an appeal, but we contend that at the time this appeal was sought to be taken, the appellant having tacitly allowed the record to be transmitted to the lower Court, and jurisdiction exercised therein, by that Court for nearly nine months, the mode of procedure adopted gives to this Court no power to review the case upon its merits, the appellant having failed to have filed in this Court the record of said case, as required by rule of this Court.

It cannot be urged that the alleged record filed in this Court, apparently properly authenticated by the clerk of the Supreme Court of Dakota, is conclusive of its own validity, for it is by itself impeached in this, that it shows upon its face that the record in said case was remitted on June 22nd, 1887, to the District Court of Stutsman County, from which the appeal was taken, and the statute providing for such transmission defined the record as "all papers transmitted to the Supreme Court on the appeal." It cannot be urged that the clerk failed to obey this provision of the law, for such presumption is precluded by the record, and were it not, a mere failure of the clerk to remit the record in a cause will never militate to the prejudice of a party, for in contemplation of the law there was no record after the expiration of the limit for its retension. The statute above referred to is identical in its provisions with those of chapter 263, Laws of Wisconsin, 1860. In the case of Pringle vs. Dunn, and others, (39 Wisconsin 435), Chief Justice Ryan in writing the opinion of the Court, said: "The statute of 1860 requires the clerk of this Court to remit appeal papers to the Court below, within 30 days after judgment on the appeal, unless this Court directs them to be retained for the purpose of a motion for a re-hearing. And when the papers are so remitted, all jurisdiction here of the appeal ceases, *and we are obliged to hold that even when the record is not actually reimtted, the statute takes away the jurisdiction of this Court of appeals after thirty days from judgment, unless the record is retained here, by order of the Court under the statute.* See also, Pierce vs. Kelly, ibid 568. This doctrine was followed by the Su-

preme Court of Dakota, in the disposition of the motion for a re-hearing on February 6th, 1888, in this case, some seven months after its jurisdiction had ceased by the transmission of the record, after which it could not reacquire jurisdiction or recall the record, except so far as it had power to recall its own judgment, for the purpose of correcting clerical errors therein. (See opinion of Court, page 54 of printed record.) Also, Washington Bridge Co. vs. Stewart, 3 How, U. S. 413. Nonan vs. Bradley, 12 Wall. 128.

Every presumption of the validity either of this appeal, or of the purported record now on file in this Court, pre-supposes a direct violation by the Supreme Court of Dakota, or its clerk, of the plain provisions of the Dakota statute, which the Court will never presume.

So far as this question is concerned, it is clear that the rule would be the same in case of an appeal, as in cases where a jury was employed to determine issues of fact, and a writ of error sued out.

There are numerous and uniform decisions of this Court holding that a writ of error should be directed to the Court in which the record is deposited at the time of the issuance of the writ.

In the case of Gelston, et al, vs. Hoyt, 3 Wheaton 304, it appeared that a writ of error was directed to the Court of appeals, of the state of New York; such Court having remitted the record to the Supreme Court prior to receiving the writ, could not execute it. It was then presented to the Supreme Court, but being directed to the Court of appeals, could not regularly be executed by that Court.

See Aldrich vs. Aetna Insurance Co., 8 Wall. 491. Polleys, et al vs. Black River Improvement Co., 113 U. S. 81.

In the case last above cited there was a motion to dismiss the appeal on the ground that the writ of error was directed to the Circuit Court of La Crosse County, and it was claimed that the same should have been directed to the Supreme Court of the State. It was held that under the Wisconsin statute the record itself was remitted to the lower Court, and the writ was therefore properly directed to such Court. The objection above stated was overruled.

The provisions of the statutes of New York and Massachusetts, respecting the transmission of records, are similar to those of Wisconsin and Dakota, and require the record itself to be remitted to the Court from which the appeal emanated.

This Court has held that in appeals from such states, when the Supreme Court is not the custodian of its own records, the proper practice is to direct the writ of error to the inferior Court in which the record is deposited. Foxton D. Atherton, et al vs. John Fowler, et al, 91 U. S. 143.

"The writ of error is properly directed to the Court which holds the proceedings as part of its own records, and exercises judicial power over them." Hunt vs. Palos, 4 How, 590.

"The record cannot be found in two Courts at the same time. The original record may be in one and a copy in another, or one Court may have the record, and another the means of making one precisely the same in all respects, but the record proper can only be in one place at the same time." Atherton vs. Fowler, *supra.*

It follows that had this appeal been prosecuted by a writ of error, the same should have been directed to the District Court of Stutsman County, and not to the Supreme Court of Dakota. And the same rule is applicable in cases of appeal; and it was incumbent on the appellant to produce the record from the Court having the proper custody thereof, and jurisdiction in the case.

It is unnecessary to consider the proper mode of procedure to obtain the records in a cause appealed from, and to invest this Court with jurisdiction thereof, after the Sureme Court of a Territory has exhausted its jurisdiction, and parted with the record, and the inferior tribunal from which the appeal was originally taken has exercised jurisdiction therein, it being the legal custodian of the record, but we submit,

1st. That when this appeal was taken, the Supreme Court of Dakota had no more authority to act in the matter than it had before the first appeal was taken from the judgment of the District Court, for the District Court had reacquired jurisdiction of the action, and the custody of the record, and two tribunals cannot have jurisdiction over the same controversy, nor be the legal custodians of the same record at the same time.

2d. That an appeal from a Court having neither jurisdiction

of a controversy, nor custody of the record, cannot operate to invest the appellate Court with either jurisdiction of the controversy, or legal custody of the record.

But over and beyond the question as to the power, or right, of the Supreme Court of Dakota, or a Judge thereof, to grant an appeal from a cause not then pending in said Court, and the jurisdiction of this Court in the premises, appellees submit that this cause should be dismissed for the reason, that the appellant has utterly failed to comply with rule nine of this Court, in this, that they did not cause *the record* thereof to be filed with the clerk of this Court, within the first six days of the term to which the appeal was taken. True, they caused to be filed certain papers purporting to be the record, but so garbled that its falsity could only be disclosed to this Court by a *certiorari* proceeding which developed the fact from the journal, or trial docket, of the Territorial Supreme Court, that the record in fact, was not in said Court, but was at the date of appeal, by remittitur, in the custody and jurisdiction of another Court, to-wit: the District Court of Stutsman County; a fact which must have been known to appellant at that time; for it now appears by the return to said *certiorari* (page 54 of the printed record,) its motion for a re-hearing was refused and dismissed for that very reason. Yet with this knowledge, no attempt was made to obtain the true record, and file the same as required by said rule. Under the provisions of this rule 9), it is the appellees privilege, in case of the failure of the appellant to comply therewith, to move to dismiss. This privilege they could not avail themselves of until after the return to the *certiorari*, the purported record filed not disclosing upon its face anything to impeach its validity. We therefore submit for the reasons assigned the appeal in this case should be dismissed.

Second, on the motion to affirm.

The assignments of error in this case present but two questions for the consideration of the Court. 1st. Were there any taxes due on the land sold? (1st assignment.) 2d. If no taxes were due on the land sold under the provisions of section 78, of chapter 28, of the Political Code of Dakota Territory, were plaintiffs below entitled to recover from the Appellant County the pur-

chase money price, with subsequent taxes paid with interest at 30 per cent.? (For assignments of error see printed record, page 51.) As to the first point it is conceded in the stipulated facts (see printed record, page 27-28, sec. 1, 2, 3 and 4, copy of stipulated facts) that the government of the United States, since the passage of the act of July 15th, 1870, had caused said lands to be surveyed at its own expense, no part of which expense, or cost of surveying, was paid to it by said railroad company, or by any one in its behalf, or by any party in interest, prior to March 16, 1886. "The patents for said lands, or any of them, had not on the first day of January, 1884, been issued to said Company, or to any person for said Company, and the Government of the United States refused to issue said patents until the payment for surveying and selecting said lands, as above mentioned and required by said act of July 15th, 1870, had been done." "And said act is made a part hereof" The act of Congress of July 15, 1870, reads as follows: "And provided further, that before any land granted to said Company by the United States shall be conveyed to any party entitled thereto under any acts incorporating or relating to said Company, there shall first be paid into the treasury of the United States the cost of surveying, selecting and conveying the same, by the said Company, or party in interest." 16 U. S. St. at Large, pages 305, 306.

This stipulation then brings the case clearly within the rulings of your Honorable Court with regard to the liability to taxation of the lands granted the Northern Pacific Railroad Company, in the case of Northern Pacific Railroad Company vs. Traill Co., 115 U. S., 600, &c., as well as your rulings in the cases of Railway Co. vs. Prescott, 16 Wall 603, and Railway Co. vs. McShane, 22 Wall, 444.

This case being on all fours the same as that of the Traill Co. case above cited, the District, and Supreme Court below, could not otherwise hold than that the lands sold by the Treasurer of said Appellant County, and purchased by Wallace, were not subject to taxation, and that therefore there were no taxes due on them at the time of sale. The date of the rendering of the decisions above cited were all prior to the commencement of this suit in the District Court, and upon the argument of the case,

both in the District and Supreme Court, were cited by counsel for the appellees, and appellant county, and its counsel, were fully aware of their import and applicability to the facts in this case. In assigning, then, for error, that "the Court erred in holding that the lands mentioned were not subject to, or liable for, the taxes assessed thereon, and that there were no taxes due thereon when sold," they fly in the face of these three well known decisions, and bring themselves within the rule of Swope vs. Leffingwell, 105 U. S. page 3, and McKee vs. Rains, 10 Wall, 22. In the first of these cases your Honorable Court held on a motion to dismiss and affirm, that "when this Court has jurisdiction, a federal question being involved, but the decision below being in accordance with precedents of this Court, a motion to affirm will be granted." But further in support of Appellees motion for affirmation with 10 per cent. damages for delay, your Honorable Court's attention is called to the facts stipulated, (printed record, page 30, 31, sections 8 and 9 of copy of stipulated facts) that two suits were brought by said Railroad Company against the Treasurer of said Appellant County in 1884 and 1885 to restrain them and their successors from the execution and delivery of deeds to said defendant, Charles S. Wallace, for these same lands purchased by him under the same facts and circumstances as those stipulated in the case of Northern Pacific Railroad Co. vs. Traill Couty, and after the decision and publication of said case, and upon the authority of the same, viz: on August 6th and Sept. 17th, 1886, the District Court, in and for said Appellant County, made the orders and decrees prayed for therein, of all of which facts Appellant County had not only full notice, but was actually bound, precluded and estopped thereby from asserting any right to tax the same. These circumstances ought to, and we feel warranted in believing, will weigh much in determining the decision of your Honorable Court favorably to this motion.

This disposes of the only federal question involved in this appeal. The second is one that arises under a Territorial statute and draws in question no constitutional, or statutory, enactment of the Congress. A statute passed by the Territorial legislature for the local regulation of its revenues and better securing the

collection of the same. This Court has so many times decided that it would not review the decision of the highest court of a state on the provisions of a mere local statute calling in question no constitutional or statutory right of the citizen of the United States, that it would be an affectation of learning to cite the authorities, and in the case of Sweeny vs. Lomme, 22 Wall, 208, the same rule was applied in the case of Territorial local regulation, when different states and territories had construed the same statute differently. Such a rule is eminently proper, and particularly so in a case when the decision of a territorial court coincides with the uniform decisions of neighboring states and territories with similar legislation. See also Miners Bank vs. Iowa, 12 How, 1.

The statutory provisions of Dakota Territory upon the question at issue is very comprehensive and free from the charge of ambiguity. Sec. 78, chapter 28 of the Political Code, and under which recovery was had in this case in the Courts below, is as follows: "When, by mistake or wrongful act of the Treasurer, land has been sold on which no tax was due at the time, the county is to save the purchaser harmless by paying him the amount of principal and interest to which he would have been entitled had the land been rightfully sold, * * In order to determine what the purchaser is entitled to be paid by the county, section 70 of the same chapter declares, "The owner or occupant of any land sold for taxes, or any other person, may redeem the same at any time within two years after the day of such sale, or at any time before the execution of a deed of conveyance therefor by the County Treasurer, by paying the County Treasurer for the use of the purchaser, his heirs or assignees, the sum mentioned in the certificate, and interest thereon at the rate of thirty per cent per annum from the date of purchase, together with all other taxes subsequently paid, whether for any year or years previous or subsequent to said sale, and interest thereon at the same rate from the date of such payment."

The decision of the case at bar by the District and Supreme Court is in harmony with that of the Supreme Court of Nebraska in the case of Roberts, vs. Adams County, 20 Nebraska Reports,

page 409, also, McCann, vs. Oto County, 9 Nebraska, 324, &c., under the provisions of a similar statute, and from the language of which, one would suppose the Dakota Statute was copied. The Nebraska Statute reads as follows: "When by mistake or wrongful act of the Treasurer, or other officer, land has been sold on which no tax was due at the time * * the County shall hold the purchaser harmless by paying him the amount of principal, interest, and costs, to which he would have been entitled had the land been rightfully sold." * * " In the case of Roberts vs. Adams County, *supra*, a case similar to the one at bar, in this that the lands taxed and sold were United States government lands, and not subject to taxation, the Court say "No tax was due against said land at the time of sale for the reason that said land at the time of assessment belonged to the general government and was not liable for taxes. That said land was wrongfully placed upon the tax list, wrongfully assessed and wrongfully sold, * * * The statute applies to all cases where land has been sold for taxes when no taxes were due thereon. The County, through its Treasurer, by offering a tract of land for sale for the taxes claimed to be due thereon in effect says to the purchaser, that the land offered for sale was taxable, and the taxes had not been paid. Our statute has guarded the rights of a tax purchaser, and it is clear the County is liable, and the Court should have so found."

Other neighboring States, under similar laws, have ruled in the same way. Notably, the State of Kansas, in Commissioners, vs. Young, 18 Kan., 440. The State of Wisconsin, in Norton, vs Supervisors, 13 Wis., 684, State ex. rel. Wollfe, vs. Supervisors, 29 Wis. 79. Marsh, Adms., vs. Supervisors, 42 Wis., 373. The State of Iowa, in Coulter, vs. County, 17 Iowa 92, and Morrison, vs. County of Sioux, 42 Iowa 416. Judge McCrary, in the case of Corbin, vs. Commissioners, 1 McCrary, 521, arising under the statutes of Kansas, thus comments on the purpose and policy of these refunding tax laws. "The state is largely interested in the prompt collection of its revenue. When the owner of property fails to pay the taxes thereon, it becomes a matter of interest to the state to induce others to come forward and make the payment, taking a lien upon the property, which in default of

redemption, may ripen into a title. But tax titles are very uncertain, and investments in them are often precarious, because of errors and irregularities, which may not be known to the purchaser, and which may vitiate the sale. In order then to induce capitalists to come forward and invest their means in such a manner as to replenish the treasury, the state of Kansas, by the acts of 1868, and 1876, said to all such: "If you will bid at tax sales and pay your money, the amount invested with interest, shall be refunded from the county treasury in case the sale is afterwards discovered to be irregular or void." * * * In the present case, the proposition embraced in the statute was accepted by the plaintiff. Upon the faith of it he invested his money. * "There was a stipulation by the agreement of minds, upon a sufficient consideration, that the plaintiff having bid off the lands at tax sale, and paid his money therefor, should be entitled to receive his money with interest from the County Treasurer, if by reason of irregularity or invalidity the sale could not be consummated."

Applying the reasoning of Judge McCrary in the above case, and that of the Supreme Court of Nebraska, in Roberts vs. Adams County, to the facts as stipulated in this case, and under the most liberal construction of the statute of Dakota, the District and Supreme Courts of that Territory could come to no other conclusion than that the plaintiffs below were entitled to recover; and following the tread of all the rulings of this Court that when, by the assignments of error no questions are raised other than those well decided by your Honorable Court, or are such as are for local regulation, arising upon the construction and application of local statutes, this Court will not delay a cause for final hearing, but will, upon motion, affirm the Court below, and when it is apparent that such appeal was taken in the face of well considered and uniform authority and with no hope of reversal, will affirm, with costs, as provided by rule 23.

J. H. Baldwin
Atty for Defts

Office Supreme Court U. S.
FILED.
NOV 10 1891
JAMES H. McKENNEY,
CLERK

# Supreme Court of the United States.

**OCTOBER TERM, 1891.**

*No. 89.*

STUTSMAN COUNTY, APPELLANT,

*vs.*

CHARLES S. WALLACE ET AL.

## REPLY BRIEF ON BEHALF OF THE APPELLEES.

W. E. DODGE,
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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

# Supreme Court of the United States.

**OCTOBER TERM, 1891.**

*No. 89.*

STUTSMAN COUNTY, APPELLANT,

*vs.*

CHARLES S. WALLACE ET AL.

## REPLY BRIEF ON BEHALF OF THE APPELLEES.

REPLY TO POINT IV OF APPELLANT'S BRIEF.

This reply is submitted in view of the fact that appellant's brief was not filed or served until the day upon which this cause was called for argument, and long subsequent to the preparation and filing of our own brief.

*Appellant makes the specific point that in any event appellees can only recover the county taxes; and as they are mingled with those levied for other purposes, there can be no recovery.*

Our reply to this point is, first, it was never assigned as error in the record of this case, either in the supreme court of Dakota Territory or in that upon which the appeal to this Court is based; hence it was never called to the attention of or considered by either the territorial district court which rendered the original judgment, since it was not included in appellant's motion for a new trial (Printed Record, page 37)

or the supreme court of Dakota Territory, since it was not included in appellant's assignment of errors filed therein.

Printed Record, pages 39 and 40.

This Court will only review questions which appear by the record to have been called to the attention of and considered by the tribunal from which the appeal was taken.

Phillips' U. S. Supreme Court Practice, 283.

Bell *vs.* Bruin, 1 How., 169.

No such point is assigned as error in the specifications set out in appellant's brief, pages 6 and 7.

Rule 21, U. S. Supreme Court.

For all of which reasons the point now made for the first time should be disregarded.

Second. Recovery is sought against the defendant county upon the ground that it has, through the instrumentality of its treasurer, received into its treasury the plaintiff's money wrongfully and without consideration, not as taxes, because none were assessed against the lands in question; no tax lien existed, and no charge was due the county which it was authorized by law to receive or retain upon any theory or pretext whatever. As was said by Justice Williams, in Clapp *vs.* Pine Grove Township, *supra*, "He (plaintiff) simply paid over so much money under the influence of the unauthorized and illegal acts of the tax officers; it was still his money; they had no claim upon it and no right in law or morals to withhold it from him."

The defendant county, through its officers, is alone responsible for this entire void proceeding, beginning with the pretended assessment and culminating in the sale, by reason of which alone appellees were deprived of their money. (See stipulation of facts 4, 7, and 8, Printed Record, pages 3, 4, and 5.)

Neither the territorial government nor any one of its municipalities other than the appellant had anything to do with this unauthorized proceeding, neither are they charged with notice thereof, nor does it appear that they ever shared in the fruits of defendants' wrong. There is no such admission and certainly no such presumption; but if it were true, it does not alter the status of our claim, for it is still like that in Hayes *vs.* The Pacific Mail Steamship Co., *supra*—the case of an agent who, by unauthorized acts wholly without the scope of his authority or that of his principal, wrongfully obtains money and then disburses it, which latter act can in no way alter or affect his liability.

None of the authorities cited by appellant properly apply to the facts of this case. They are either cases where taxes were levied or assessed by separate and distinct municipalities for local purposes and then certified up to some general collecting officer or municipality for collection and disbursement, such collector acting as a general agent for each and all, in which class of cases it is properly held that an action to recover the same should be brought against the municipality which levied the tax and ultimately received the proceeds thereof, or cases where a tax regularly assessed, but rendered void by subsequent non-compliance with statutory proceedings on the part of some of the taxing officers, was sought to be recovered back by virtue of some statute authorizing such recovery.

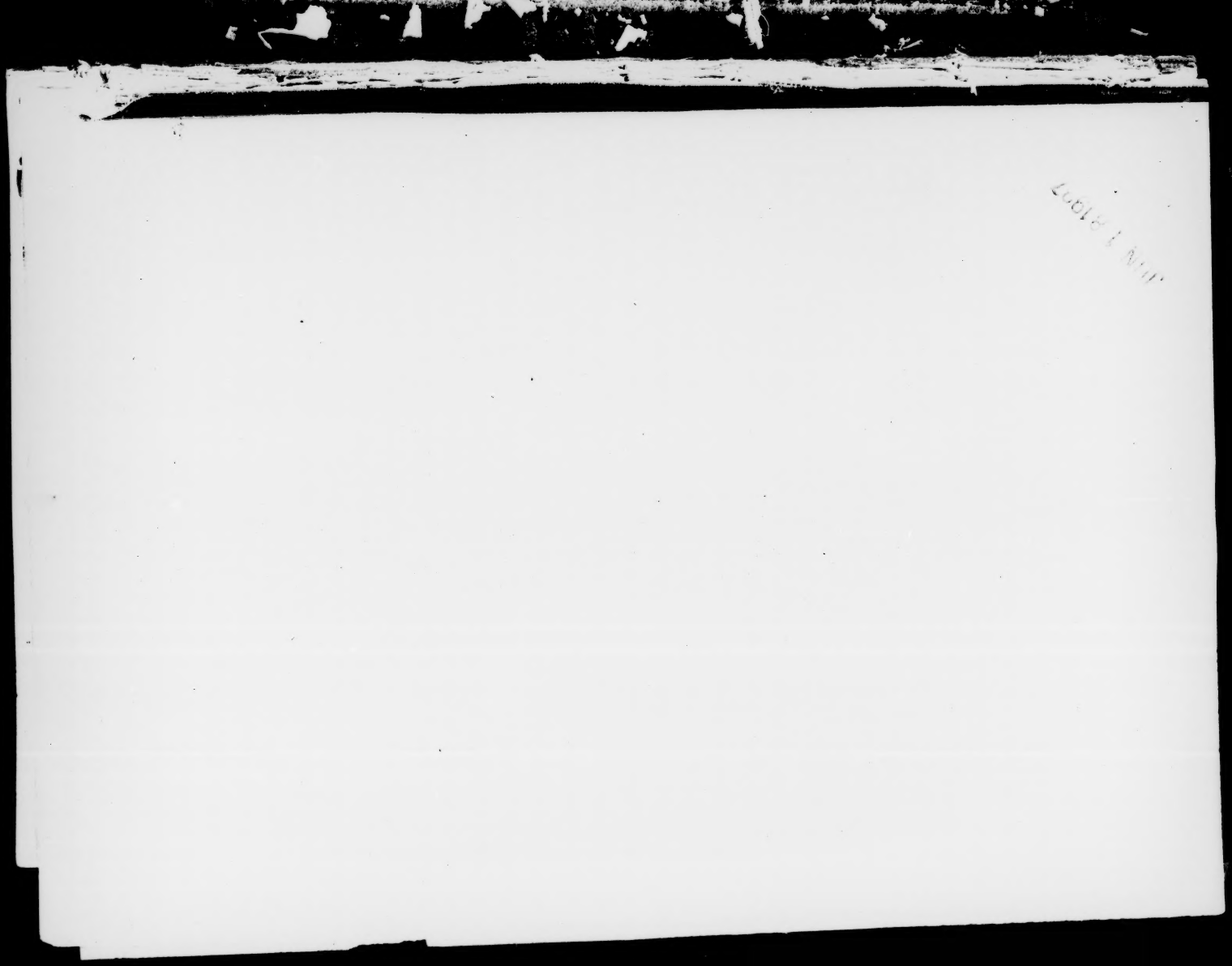
In no instance was it held that the officer making the sale without authority or the municipality for which he acted, receiving the entire proceeds thereof, could not be sued as a wrong-doer who had by false inducements obtained money without consideration.

Under the statute, section 78, defendant was liable, if at all, "for the amount of principal and interest to which he would have been entitled had the land been rightfully sold," not for a portion of such consideration only. This statute requires in terms that the county shall save the purchaser

harmless by paying him his principal and interest. There is only one contingency by virtue of which the purchaser can receive any money when the land is "rightfully sold;" that is upon redemption, under section 70 of the same chapter. It follows that the legislature necessarily intended the provisions of this section as the measure of the counties' liability in case of a sale like the present, made wrongfully or by mistake of fact. The statute is susceptible of no other construction, and in every case cited in our brief—notably that of Roberts *vs.* Adams County, *supra*, as well as those cited from Iowa, Wisconsin, and other States—similar statutes have universally received the same construction.

Respectfully submitted.

W. E. Dodge,
J. H. Baldwin,
*For Appellees.*



PLAT OF THE

# PUEBLO OF SAN FRANCISCO,

FINALLY CONFIRMED TO

## THE CITY OF SAN FRANCISCO,

By an Act of Congress, approved March 8, 1866, and surveyed under instructions from the U. S. Surveyor General,

JAMES T. STRATTON, Dep. Sur.

Between March, 1867 and January, 1868.

Containing 17,784.$\frac{78}{100}$ Acres.

The field notes of the Survey of the PUEBLO of SAN FRANCISCO, from which this Plat has been made, have been examined and approved, and are on file in this office.

U. S. Surveyor General's Office, San Francisco, California, August 13, 1868.

L. UPSON,
U. S. Sur. Gen., Cal.

No 1348.
Knight
v.
United Land
Association
et al.
} p. 9.

GOLDEN GATE

POINT SAN JOSE MILITARY RESERVATION

PRESIDIO MILITARY RESERVATION

CITY OF SAN FRANCISCO.

SAN FRANCISCO BAY

Beginning

Mouth of Mission Creek

Channel line of S.F.

Lobos Creek

MOUNTAIN LAKE.

LAGUNA SECA

LAKE HONDA

PARK STREET.

Old Stone Wall

Precita Creek.

Old Presidio Road

PART OF
RANCHO SAN MIGUEL
lying North of the "Four League Line."

PART OF THE RANCHO
RINCON DE LAS SALINAS Y POTRERO VIEJO
lying above the line of ordinary high tide and North of the "Four League Line"

PACIFIC OCEAN

CITY AND COUNTY OF SAN FRANCISCO.

THE "FOUR LEAGUE LINE."

*Being an East and West Line cutting off from the Peninsula of San Francisco Four Leagues of Upland, or land lying above ordinary high tide.*

234.46

84.27

134.53

Hi, is the map referred to at pages 8 and 9 of Knight's (Land Association) Land Reports? Knight claimed Rancho Rincon de las Salinas y Potrero Viejo, and Rancho San Miguel. Phipps & Sharp, attorneys for plaintiffs. C. F. Preble, attorney for defendant.